U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

DATE: October 24, 2000
CASE NO.: 1999 - INA - 287

In the Matter of:
GEORGE'S AT THE COVE,
Employer,

on behalf of

JOSE A. SOBERANIS MENDIOLA,
Alien.

Appearance: Gary Spencer, Esq
Solana Beach, CA

Certifying Officer: Rebecca Marsh Day
San Francisco, CA

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Jose Alfredo Soberanis Mendiola ("Alien") filed by George's At The Cove ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of

the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a on September Notice of Docketing and Order Requiring Statement of Position or Legal Brief 10, 1999; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a ground of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Case

On or about May 11, 1995, Employer filed an application for labor certification to allow it to fill the position of "Cook" in its La Jolla, California restaurant business. The position was described as:

> Cook to prepare a wide range of menu items for a large and busy upscale restaurant with over 165 employees. Use and knowledge of standard restaurant equipment, appliances, and utensils. Must be able to work under extreme pressure, especially during peak dining hours. Must be able to obtain a County of San Diego Health Foodhandler's card. Must be able to speak Spanish as the kitchen is fully staffed with Hispanic workers and the only language [in which] they can understand OSHA safety instructions and food preparation instructions is Spanish.

A sixth grade education and two years of experience in either the offered position or the related occupation of "restaurant cook" were required. The job paid $8.00 an hour, and called for a 40 hour work week. (AF 280). The work schedule was Wednesday through Sunday from 2:30 p.m. to 11:00 p.m. (AF 281).

An appeal of the denial of this application initially reached the Board as case number 1998-INA-244. On March 24, 1999, that case was remanded to the CO by Administrative Law Judge Frederick Neusner for further proceedings when it was discovered that no information regarding Employer's recruitment efforts was contained in the file.

The deficiency was corrected, but a new case number was assigned. The complete file shows that Employer advertised and posted the position in accordance with the applicable regulations. Six applications were received, in two groups of three. Results were reported on November 21, 1995. Two individuals were contacted by phone, and all three received letters scheduling an interview. None showed up or called, and so were declared uninterested or unavailable. (AF 303). The second group's results were reported on January 9, 1996. One individual did not show up for the interview or call to explain his absence. He was found to be disinterested and unavailable. One applicant was hired "as we had so many opened positions." One applicant was rejected because of poor references from prior employers. (AF 282).

The CO issued an Notice of Findings ("NOF") on May 7, 1997 proposing to deny the application. Several grounds were cited. First, the CO found that there was inadequate documentation in the file that the business existed and qualified as an employer under the regulations. The Employer was directed to submit rebuttal evidence showing that it could indeed provide permanent, full-time employment to a U.S. worker. Second, the Spanish language requirement was found to be unduly restrictive under 20 C.F.R. § 656.21(b)(2)(i)(c). The CO noted that a language requirement is not normal for a cook, there was no evidence to support the assertion that the kitchen staff was entirely Hispanic, the supervisor who would instruct the Alien did not have a Hispanic name, and the application "gives us the impression you have a policy of deliberately recruiting a monolingual workforce; we could not accept a discriminatory petition." Employer was instructed to delete the requirement, document that it was a business necessity, or show that it was a customary requirement for such jobs in the U.S. Third, U.S. workers were found to be available to fill the position. Three specific deficiencies were cited. One, the rejection of one applicant for "bad references" was not found to be for lawful job related reasons. No substantial evidence of the bad references was offered, and the applicant's questionnaire, returned to the state job service, indicated that he was offered less than the wage stated on the Form 750A. Two, the hiring of another applicant for a cook position showed that there were U.S. workers able, willing, qualified and available at the time of the application. Three, the CO found that the Employer had failed to demonstrate adequate effort in contacting and considering the resumes of four applicants. The scheduling of a group interview and the possibility of a lower wage than had been advertised were cited. Employer was instructed to present rebuttal evidence showing specific reasons for rejecting one candidate and showing a good faith recruitment effort. (AF 272-276).

The Employer's Rebuttal was filed on June 21, 1997[1]. This consisted of point by point by point responses to each deficiency. Proof that a business existed was offered. A business necessity argument was offered to justify the inclusion of the Spanish language requirement. A "Dear Abby" letter, opinions from various officials, lists of employees, and other cases approving certification

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[1]Employer is apparently seeking certification on a number of applications for the same position. The Rebuttal contained in the file was actually submitted in the case of Alien Manuel Ramirez-Partida. However, with the exception of a small section, the NOFs in both cases were apparently identical. The cited deficiencies are verbatim, and Employer has addressed each with specificity. Any error is therefore harmless. None of the other cases are before us at this time.

in similar circumstances were offered in support of the contention. In the alternative, the Employer offered to delete the requirement and re-advertise. Some further detail was offered with respect to the bad references for one rejected applicant, and the allegation that a lower wage had been offered was refuted. Employer explained the hiring of one applicant by stating that there were 10 openings at the time, and so the hiring for one position did not affect the existence of a shortage of U.S. labor for the remaining openings. The allegations of bad faith in recruiting were also answered. Telephone records were submitted, for example. Statements from an immigration processor aiding the Employer in filing applications and from Employer's chef accompanied the application and addressed several of the deficiencies. (AF 85-271).

A Final Determination was issued on August 15, 1997 denying certification. The CO found that the Employer had failed to establish a business necessity for the foreign language requirement. The evidence showed that on 49 of the 165 employees had Hispanic surnames, and only 21 were included on a list stating they only spoke Spanish. Five of those are Aliens petitioning for certification. Further, even with a language requirement in the advertisement, 4 of 6 applicants were Anglo. The CO felt this supported a finding of discrimination based on national origin. The assertion that past cases had been certified was rejected. The cited cases were all 5 years or more old, and the CO was not obligated to repeat an error by giving employers the benefit of the doubt. With regard to the applicant rejected for bad references, the CO noted discrepancies between the number of former employers contacted according to the chef and the immigration specialist, and further noted that which former employer or employers had been spoken with was never stated. The CO cited the admission that there was at least one ready, willing, and able U.S. applicant and additionally noted that five other applicants' qualifications had not been refuted. Finally, the CO cited the letters sent to the applicants as not fully informing them of the interview process, and additionally noted that the telephone records showed a one month delay in contacting one applicant, that another was phoned a day before his resume was received, and another was never mentioned. A lack of good faith in recruiting was therefore found. (AF 82-84).

A request for reconsideration of the FD or administrative review by the Board was filed on September 8, 1997. Employer alleged that the Rebuttal it filed had fully addressed the cited deficiencies, and certification was improperly denied. (AF 1-81). Because of the multiple applications made, as well as the remand of the original case and the return to the Board under a new case number, the CO's June 24, 1999 denial of reconsideration was never entered into the proper (new) file. The Board, unaware that the motion had been addressed by the CO, offered the Employer an opportunity to waive reconsideration instead of having the case remanded. (Order of Oct. 14, 1999). Employer waived reconsideration and requested that administrative review proceed by a response filed June 3, 2000.

The original panel, including Judge Neusner, initially considered the second appeal. However, that panel dissolved as a result of retirement, and the case file was reassigned for full consideration by a new panel.

Discussion

The employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for decision. 20 C.F.R. § 656.2(b); Giaquinto Family Restaurant, 1996-INA-64 (May 15, 1997); Carlos Uy III, 1997-INA-304 (March 3, 1999)(en banc). Here, we agree that the Employer has failed to meet that burden.

The regulations are quite clear that foreign language requirements are unduly restrictive. 20 C.F.R. § 656.21(b)(2)(i)(c). This determination as a matter of law may be avoided by a showing of business necessity, as the NOF instructed Employer. The CO determined that a business necessity had not been shown, and we agree.

The Board recently considered the foreign language requirement and the business necessity test in Lucky Horse Fashion, Inc., 1997-INA-182 (Aug. 22, 2000)(*en banc*). Lucky Horse emphasized that a two prong analysis is required. First, there must be a reasonable relationship between the occupation itself, in the context of Employer's business, and the restrictive requirement. Second, the foreign language must be shown to be essential for the performance, in a reasonable manner, of the job duties. Lucky Horse, *supra*; Information Industries, Inc., 1988-INA-82 (Feb. 8, 1989)(*en banc*)(establishing the business necessity test.).

Here, as in Lucky Horse, the Dictionary of Occupational Titles ("DOT") does not implicitly or explicitly include a need for a foreign language for a Cook. The Employer must therefore establish a reasonable relationship between the occupation and the requirement. Here, the Employer stated on the Form 750A and in Rebuttal that the language requirement is needed to allow communication among co-workers because "the kitchen is fully staffed with Hispanic workers and the only language that they can understand is Spanish." (AF 280). The Rebuttal attempted to support this contention by quoting from a "Dear Abby" column that referred to the need for Spanish in southern California, declarations from 27 employees (translated to English) declaring an inability to speak English, and documents from county agencies demonstrating that many applicants for Foodhandler Certificates speak Spanish. Additionally, Chef Scott Meskan attached a declaration stating that the kitchen staff did not speak English. We note that the declarations of workers repeat the litany, with little variation, that they work at George's At The Cove and do not speak English. None stated that they work in the kitchen. The declaration of the sous chef, who uses Spanish to communicate with "his employees," presumably refers to kitchen staff. Additionally, the Alien's is among the declarations, and the CO noted that other aliens applying for certification are numbered among the declarers. None of the declarations were made under an oath or under penalty of perjury.

The Employer's evidence establishes that there are 27 employees out of the 165 who work at the restaurant who allege that they do not speak or understand English. There is no indication of the capacity in which any of these employees work, and the extraordinarily similar language of each declaration indicates that the Employer may have provided guidance in what to say. The employees, of course, have an interest in following any instruction. Some credibility issues

therefore arise. This is very similar to the situation in Lucky Horse, where "the Employer's only evidence presented in rebuttal is that a high percentage of his workforce does not speak English." Lucky Horse Fashion, Inc., 1997-INA-182 (Aug. 22, 2000)(*en banc*). There, we found, that this evidence standing alone does not show that the language requirement bears a reasonable relationship to the occupation in question, within the context of Employer's business.

We noted in Lucky Horse that an Employer may be required to present evidence that the existing workforce does not speak English as a result of lawful market forces, and not grounded in violations of immigration or labor laws. Lucky Horse Fashion, Inc., 1997-INA-182 (Aug. 22, 2000)(*en banc*) at n. 4. The Employer has attempted to show the impact of market forces upon the labor force by presenting evidence of the ethnic populations in the San Diego area (AF 256), the impact of Spanish speaking workers on the administration of agency functions (AF 233-255), the popular opinion as represented by "Dear Abby" (AF 90-91) and assertions that Employer had more openings than it had applicants. The CO, of course, found that a pattern of discriminatory hiring had taken place based upon the questionnaire responses of one applicant and the ethnic identity of the other applicants.

While we do not necessarily agree with the CO's conclusion regarding intentional discrimination, we do find that the Employer has failed to establish that there is a business necessity for the foreign language requirement, even if we accept that all declarations in the file are from kitchen staff and accurately show that the staff does speak only Spanish. As the CO pointed out, two-thirds of the applicants for the job here were not Hispanic. It is not indicated that the majority of workers at Employer speak only Spanish. The county agencies do offer Spanish language applications and classes, but they also do so in English. The 1996 population figures cited in a submitted newspaper article indicate that the Hispanic population varies from 10% up to 46% in areas of the county. These are not overwhelming numbers, and, further, the restaurant's La Jolla location has the lowest population of Hispanics, according to the article. (AF 256). There is no evidence to support the contention that only Spanish speakers are able, willing, and available to perform the job. Therefore, we find that the first prong of the business necessity test is not met.

We additionally find that the second prong of the test is not met. The foreign language is not necessary to perform the job duties in a reasonable manner. The sous chef is alleged to run the daily activities in the kitchen. He has declared that he communicates with his workers in Spanish. He does not, however, indicate that he does not speak English. Further, he presumably receives instruction from the executive chef, who is not alleged to speak any Spanish at all. The sous chef could therefore communicate with any English speaking workers in that language, and could use Spanish with those requiring such, if any are present.

Moreover, we agree with the findings of the CO with regard to the rejected U.S. workers who applied for the position. The Employer did not offer adequate detail regarding the "bad references" for one applicant, either with respect to the source(s) of such or the specific allegations against him. "Poor work performance/unacceptable conduct" are not sufficient

description. (AF 258). Further, there are inconsistencies in the file with regard to attempts to contact applicants. One applicant was referred to the Employer on December 8, 1995 (AF 300-302), but the Rebuttal evidence indicates he was called on December 7, 1995. (AF 259). The supporting documentation refutes the contention that calls were attempted in connection with this position. We therefore cannot fully credit Employer's contentions regarding its recruitment efforts, and find that Employer has not met its burden of proof. Good faith in recruiting has not been shown under consideration of all the evidence.

Order

Based on the foregoing, the Final Determination of the CO is affirmed, and labor certification is denied.

For the Panel:

John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.